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TRANSMITTAL VIA E-MAIL, FAX, AND U.S. MAIL

Paula J. Wilson
Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706-1255

RE: Comments on Preliminary Draft Rule, Docket No. 58-0102-1001

Dear Ms. Wilson:

As an introductory observation, Hecla takes exception to the allegation that the state of Idaho does not implement the state's antidegradation policy merely because there is no formal written document outlining the approach. Both the water quality-based permitting approach, coupled with biological assessment/opinions where required by federal law, fully protect the beneficial uses of Idaho's waters. We are not aware of any situation in Idaho where the technical lack of a written implementation approach for the antidegradation policy has jeopardized any beneficial uses anywhere in the state. Hecla appreciates the opportunity to comment on the preliminary draft rule. Our comments are as follows:

1) The formatting of the preliminary draft rule is difficult to follow unless a word-by-word comparison of the existing rules versus the preliminary draft rule is made. The preliminary draft rule notes "The following is largely proposed new rule language", yet a great deal of existing rule language is present in the preliminary draft rule text, but there is no guarantee that this language is identical to existing rule language. Stricken language, presumably from the existing rule text, found in the latter half of the preliminary draft rule, now appears in the section of "largely proposed new rule" text, but it is not apparent that changes were made to existing rule text or simply moved to another section of the rules. The change in a single word can change the intent. The preliminary draft rule text must be formatted so that proposed new preliminary draft rule text is clearly distinguishable from the language of the existing rules contained in the proposed preliminary draft rule; otherwise the public process is compromised.

2) The "DESCRIPTIVE SUMMARY" section in the Idaho Administrative Bulletin states "Federal law requires the state to have both an antidegradation policy and methods to implement the policy." This is not correct. The only Clean Water Act (CWA) reference to the implementation of an antidegradation policy is specific to the Great Lakes region. CWA Sec. 303(d)(4)(B) only contains a reference to an "antidegradation policy", not implementation of an antidegradation policy, with application here specific to situations concerning the technology-

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based effluent limitations of CWA Sec. 301(b)(1)(A) & (B). It is clear that water quality related effluent limitations required under CWA Sec. 302 are considered by Congress as meeting antidegradation considerations, otherwise Congress would have included CWA Sec. 302 as falling under the "antidegradation policy" provisions of CWA Sec. 303(d)(4)(B). The unrestrained "implementation" of an antidegradation policy in state rules, beyond the clear reading of the CWA, appears to be an outgrowth of both federal regulations at 40 CFR §131.12 and court reliance on federal regulations. As such, the actual implementation of "antidegradation" rests exclusively with the individual States, as guaranteed by Congress at CWA Sec. 101(b).

3) The "DESCRIPTIVE SUMMARY" section in the Idaho Administrative Bulletin states that the purpose of the preliminary draft rule is "to include procedures for implementing efforts to limit degradation of water quality", yet the rule clearly is attempting to change the very meaning of Idaho's antidegradation policy. The preliminary draft rule, at proposed language 051.01.a. states "The purpose of antidegradation is to: a. Maintain the highest possible quality in the surface waters of Idaho;" This language appears nowhere in either Idaho Code (IC) or existing antidegradation rules and is an attempt to shift the legal focus found in IC from the protection of "beneficial uses" to the nebulous "highest possible quality in the surface waters of Idaho". The entire subsection 051.04 "**Implementation**" is compromised by this fault. The state's antidegradation policy is clearly set out in IC as follows:

> **39-3603. GENERAL WATER QUALITY STANDARD AND ANTIDEGRADATION POLICY.**
>
> The existing instream beneficial uses of each water body and the level of water quality necessary to protect those uses shall be maintained and protected. Where the quality of waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of this chapter, and the department's planning processes, along with appropriate planning processes of other agencies, that lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such reductions in water quality, the department shall assure water quality adequate to protect existing uses fully.

Further, the preliminary draft rule clearly misrepresents the existing rule's "Antidegradation Policy", which already reflects the Legislative intent of the IC antidegradation policy. The heading of the stricken rule language of the existing antidegradation policy apparently masks the fact that this section is the antidegradation policy in the existing rules. Because the purpose of the preliminary draft rule is implementation of the state's existing antidegradation policy, any attempt to change the state's existing antidegradation policy is not authorized.

The introduction to any new rule section specific to "antidegradation policy and implementation" must clearly state the IC language cited above verbatim, as well as the existing rule antidegradation policy verbatim, with a clear statement that the implementing rule language

"shall be interpreted strictly in light of the antidegradation policy as stated herein." This will assure legislative intent is not circumvented.

4) The preliminary draft rule clearly goes beyond legislative intent and can be interpreted as a "zero growth" antidegradation policy. In addition to the concerns in above comments, IC is crystal clear on the legislative intent in implementing the requirements of the CWA. IC 39-3601 clearly states:

> It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter not impose requirements beyond those of the federal clean water act.

The verbatim language of the federal antidegradation policy regulations is as follows:

> **§131.12 Antidegradation policy**
>
> (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy pursuant to this subpart. **The antidegradation policy and implementation methods shall, at a minimum, be consistent with the following**:
> (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
> (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control.
> (3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected.
> (4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act. (emphasis added)

It is key to note the above federal regulatory language at §131.(a) addresses both the "antidegradation policy" AND the "implementation methods". Any rule language implementing an antidegradation policy that is more stringent than the plain reading of the federal regulatory requirement violates IC. Examples of more stringent requirements in the preliminary draft rule include, but are not limited to:

1. The inclusion of "Special Resource Waters" (SRW) into the implementation of the antidegradation policy. Aside from the fact there appears to be no IC support for a SRW classification, such waters are included in a separate, more stringent category of antidegradation implementation protection not required by the federal regulations. SRWs cannot be treated any more stringently under antidegradation than any other state waters, thus a "SRW" designation can have no impact under antidegradation implementation. SRWs now appear to be superfluous and unnecessary due to antidegradation implementation, thus should be deleted from the rules or, at a minimum, isolated to a specific section, as in the current rules, clearly separate from antidegradation implementation.

2. The language for "**Tier III protection** to prohibit further degradation…"(underline emphasis added) is a "zero" approach contrary to the federal regulations, thus contrary to IC.

3. There are only three categories of protection under the federal regulations for implementing antidegradation policies, yet not only do the preliminary draft rules contain four categories of stringency, the wording throws ALL waters into at least a "**Tier II**" category due to "**Tier II protection** applies to all waters on a parameter by parameter basis…". This functionally obviates a "Tier I"/§131.12(a)(1) category. EPA-approved antidegradation policy implementation in other states places 303(d)-listed waters to those states' equivalent "Tier I"/§131.12(a)(1) category, which is wholly appropriate for "impaired waters" and other waters not deserving "high quality" designation. This approach was both approved by EPA and recently upheld by the United States Court of Appeals, Sixth Circuit (Kentucky Waterways Alliance v. Johnson, No. 06-5614, 3 September 2008).

4. EPA-approved antidegradation policy implementation in other states exempts reissued permits from antidegradation reviews, yet the preliminary draft rules do not – again, more stringent than allowed by IC. Such an exemption is perfectly rational given that antidegradation is designed to maintain existing instream beneficial uses and the level of water quality to protect those uses (which includes existing permit discharges). Further, both anti-backsliding provisions of existing permits and the water quality-based permitting process, which is now the norm, implements the antidegradation policy under the CWA as commented above.

5. EPA-approved antidegradation policy implementation in other states allows a water body by water body approach, whereas the preliminary draft rule mandates not only a "**Parameter by Parameter Approach**", but a seemingly all-inclusive parameter approach that could theoretically invoke the entire periodic table of the elements, even those for which no criteria have been set. This approach also can effectuate a "zero" discharge/growth process – again, in violation of IC. A traditional water quality-based permit approach has never been found to not adequately protect beneficial uses.

6. Exclusions from Tier II review, regarding deminimus levels, should include both "industrial discharges" and "BCC toxins". Such exclusions from deminimus are not mandated by either federal law or regulation. Further, such blanket exclusions falsely presume some scientific basis, and Idaho rules must be based upon sound science.

5) Exemptions from antidegradation review need to be expanded beyond "**Restoration Projects**" to include both any activities subjected to federal biological assessments or biological opinions and to all activities within any superfund-related site where water quality is a component of the superfund remedy. Such exemptions are appropriate given the extraordinary level of detail given to such sites and activities.

6) The preliminary draft rule also circumvents IC in another key aspect. Definitions in IC are being contradicted by definitions in the preliminary draft rule. IC sets out ~~a~~ key definitions, specific to water quality, such as:

> "Lower water quality" means a measurable adverse change in a chemical, physical, or biological parameter of water relevant to a designated beneficial use, and which can be expressed numerically. Measurable adverse change is determined by a statistically significant difference between sample means using standard methods for analysis and statistical interpretation appropriate to the parameter. Statistical significance is defined as the ninety-five percent (95%) confidence limit when significance is not otherwise defined for the parameter in standard methods or practices. (IC 39-3602(11))

It is disturbing to note that this statutory definition exists in the current rule yet is stricken. The proposed definitions of both "Degradation" and "Measurable" attempt to turn the intent of Idaho's statutory definitions from water quality "relevant to a designated beneficial use" to any change in water quality alone, simply because it is "measurable". Here again, the nebulous nature of the preliminary draft rule language sets up potential mischief to implement a defacto "zero" growth/ development situation contrary to legislative intent. IC must be thoroughly reviewed to assure rule definitions do not contradict those found in Idaho law.

Hecla will remain involved in the rulemaking process due to concerns that antidegradation implementation may result in a "zero" or "no economic growth" outcome, contrary to both the intent of the Legislature and best interests of Idaho's productive community.

Sincerely,

Paul L. Glader
Manager – Environmental Services